BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

DIONILA VIRGINA MEZQUITA Claimant	)	
VS.	)	Docket No. 1,042,398
TYSON FRESH MEATS, INC. Self-Insured Respondent	)	

ORDER

STATEMENT OF THE CASE

Claimant requests review of a June 11, 2013, preliminary hearing Order Denying Medical Treatment entered by Administrative Law Judge Pamela J. Fuller. David O. Alegria of Topeka, Kansas, appeared for claimant. Bruce R. Levine of Kansas City, Missouri, appeared for respondent and its insurance carrier (respondent).

The Administrative Law Judge (ALJ) found claimant failed to prove that claimant is in need of medical treatment or testing as a result of her work injury and denied claimant's request for medical treatment.

The record on appeal is the same as that considered by the ALJ and consists of the transcript of the June 10, 2013, Preliminary Hearing and the exhibits, the April 10, 2013, evidentiary deposition of Dr. Michael J. Baughman and the exhibits, and all pleadings contained in the administrative file.

ISSUES

Claimant contends the ALJ erred in denying medical treatment. Claimant alleges that the requested tests are necessary for purposes of determining a causal connection to the original injury, diagnosis and treatment. Claimant also argues there is no evidence of an intervening event or injury since her employment with respondent ended, and therefore, her testimony should be conclusive. Further, claimant argues Dr. Baughman's speculation that claimant was not requesting medical treatment is unsupported.

Respondent maintains this case is time barred under K.S.A. 44-534(b). Further, should the claim be found timely, respondent argues claimant failed to submit a diagnosis and causation opinion relating her current complaints to previous employment with

respondent and therefore has failed to satisfy the burden of proving injury. Additionally, respondent argues claimant failed to prove she is in need of medical treatment as a result of an injury from work activities in 2004.

The issues for the Board's review are:

1. Should the ALJ have ordered testing recommended by the treating physician for purposes of determining a causal connection to the alleged injury, diagnosis and treatment?

2. Should the testimony of the claimant be deemed conclusive absent any evidence of intervening re-injury?

3. Should any weight be given to the opinions of Dr. Baughman?

4. Is this claim time barred by K.S.A. (Furse 2000) 44-534(b)?

FINDINGS OF FACT

Claimant currently works as a security supervisor for ABM Security in Dodge City, Kansas. Her current employment began on November of 2008. In this position, she supervises approximately four other individuals and inputs data into a computer. Prior to her position at ABM Security, claimant was employed with respondent from 2003 to January of 2008 as a trimmer, using a hook and a knife to trim meat.

Claimant testified she developed pain in her right wrist and right hand, with swelling in her right hand, in September of 2004. She reported her injury to respondent. Respondent authorized medical treatment and referred her to Dr. Michael Baughman, a board certified orthopedic surgeon. On November 16, 2004, Dr. Baughman diagnosed claimant with right de Quervain's tendinitis and recommended conservative management, including medication, a thumb spica splint, and physical therapy. He noted claimant needed "to be prepared for up to six months of immobilization for this condition to resolve spontaneously."[1]

Additionally, respondent's injury documentation submitted to Dr. Baughman indicated claimant had complaints of bilateral upper extremity and low back pain at the time of her November 2004 visit. Dr. Baughman testified that when seeing a patient for workers compensation, he confines his evaluation to those things he is authorized to evaluate as represented in the nursing check-in form. He further explained:

[1] Baughman Depo., Ex. 2 at 22.

> I have personnel within my office who communicate with [respondent's] safety officer and nursing department, and when they refer somebody, we often have requests or expanded complaints on the part of patient that are beyond what I've been asked to focus on.[2]

The nursing check-in form relating to claimant's injury confined Dr. Baughman's treatment to the right forearm, right wrist, and right thumb pain.

Dr. Baughman again met with claimant during a follow up appointment on December 14, 2004, for right de Quervain's tendinitis of the wrist. He wrote, "[Claimant has] had resolution with conservative treatment."[3] He specifically inquired as to claimant's back and left upper extremity, and she denied complaints. Dr. Baughman released claimant to unrestricted activities. He testified claimant had no permanent impairment with respect to her right arm and did not require any additional treatment.

On June 16, 2011, claimant returned to Dr. Baughman's office at the request of her attorney. Claimant did not request authorization from respondent. Claimant had indicated to Dr. Baughman's staff she was requesting a full work release but reported to Dr. Baughman she experienced continued issues of pain and numbness about the right hand and wrist.

After conducting a physical examination, Dr. Baughman found claimant's complaints and physical findings did not correlate well. Dr. Baughman testified he was "puzzled that [claimant] was having concerns about her hand and wrist this many years later after apparently having resolution in [2004]."[4] Accordingly, Dr. Baughman's evaluation pointed away from de Quervain's tendinitis and toward a peripheral neuropathy. He testified it was his opinion that claimant was voicing new concerns rather than symptoms of her previous 2004 injury. Dr. Baughman noted claimant had no residual symptoms or findings related to the previous de Quervain's tendinitis.

In order to prove or disprove whether there were any residual abnormalities related to the de Quervain's tendinitis, Dr. Baughman recommended claimant undergo a bone scan. He further recommended she undergo nerve conduction velocity testing due to her complaints of numbness and pain. These tests were not authorized or completed.

Claimant testified she continued to suffer problems with her wrist during the time between her injury of 2004 and her visit to Dr. Baughman in 2011. Prior to her leaving employment with respondent in 2008, claimant stated she was refused medical treatment

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[2] *Id*. at 14-15.

[3] *Id*., Ex. 2 at 21.

[4] *Id*. at 10.

by the nurse. Claimant maintains she has suffered no other injuries to her right extremity since leaving respondent. Claimant further contends she continues to suffer the same problems with her right wrist as when working at respondent.

PRINCIPLES OF LAW

K.S.A. (Furse 2000) 44-534a(a)(2) states, in part:

> . . . A finding with regard to a disputed issue of whether the employee suffered an accidental injury, whether the injury arose out of and in the course of the employee's employment, whether notice is given or claim timely made, or whether certain defenses apply, shall be considered jurisdictional, and subject to review by the board.

K.S.A. 2005 Supp. 44-551(b)(2)(A) states, in part:

> If an administrative law judge has entered a preliminary award under K.S.A. 44-534a, and amendments thereto, a review by the board shall not be conducted under this section unless it is alleged that the administrative law judge exceeded the administrative law judge's jurisdiction in granting or denying the relief requested at the preliminary hearing.

K.S.A. (Furse 2000) 44-534(b) states:

> No proceeding for compensation shall be maintained under the workers compensation act unless an application for a hearing is on file in the office of the director within three years of the date of the accident or within two years of the date of the last payment of compensation, whichever is later.

By statute, preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[5] Moreover, this review of a preliminary hearing order has been determined by only one Board Member, as permitted by K.S.A. 2005 Supp. 44-551(b)(2)(A), as opposed to being determined by the entire Board as it is when the appeal is from a final order.[6]

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[5] K.S.A. 44-534a; see *Quandt v. IBP*, 38 Kan. App. 2d 874, 173 P.3d 1149, *rev. denied* 286 Kan. 1179 (2008); *Butera v. Fluor Daniel Constr. Corp.*, 28 Kan. App. 2d 542, 18 P.3d 278, *rev. denied* 271 Kan. 1035 (2001).

[6] K.S.A. 2012 Supp. 44-555c(k).

ANALYSIS

1. Jurisdiction

None of the issues presented by claimant are reviewable under K.S.A. 2012 Supp. 44-534a and K.S.A. 2005 Supp. 44-551(b)(2)(A). The Board can review only allegations that an administrative law judge exceeded his or her jurisdiction.[7] This includes review of the preliminary hearing issues listed in K.S.A. (Furse 2000) 44-534a(a)(2) as jurisdictional issues, which are: (1) whether the worker sustained an accidental injury or repetitive injury by trauma, (2) whether the injury arose out of and in the course of employment, (3) whether the worker provided timely notice, and (4) whether certain other defenses apply. The term "certain defenses" refers to defenses which dispute the compensability of the injury under the Workers Compensation Act.[8]

In *Payne v. Copp Transportation*,[9] a Board Member wrote:

> It may have constituted error for the ALJ to assign liability to the Fund without first making a determination that the respondent had no insurance and is financially unable to pay the ordered compensation to claimant, but such an omission does not render the order invalid or subject to an appeal at this stage of the proceedings. As counsel are aware, the Board has stated on numerous occasions that its jurisdiction to hear appeals from preliminary hearing orders is limited.

The determination that medical treatment should or should not be ordered, or that a witness' testimony should or should not be accepted is within the jurisdiction of the ALJ. The legislature did not confer appellate jurisdiction upon the Board for issues not listed in K.S.A. (Furse 2000) 44-534a.

The issue whether a worker is entitled to medical treatment is a question of law and fact over which an ALJ has the jurisdiction to determine at a preliminary hearing.[10] The ALJ has the authority to be wrong on that issue.[11] Jurisdiction is defined as the power of a court to hear and decide a matter. The test of jurisdiction is not a correct decision but a

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[7] K.S.A. 2012 Supp. 44-551(i)(2)(A).

[8] *Carpenter v. National Filter Service*, 26 Kan. App. 2d 672, 994 P.2d 641 (1999).

[9] *Payne v. Copp Transportation*, No. 268,622, 2007 WL 1041038 (Kan. WCAB Mar. 8, 2007).

[10] K.S.A. 2012 Supp. 44-534a(a)(2).

[11] *Dale v. Hawker Beechcraft Acquisition Co., LLC*, Nos. 1,060,057 & 1,051,048, 2012 WL 3279495 (Kan. WCAB July 18, 2012).

right to enter upon inquiry and make a decision. Jurisdiction is not limited to the power to decide a case rightly, but includes the power to decide it wrongly.[12]

The ALJ has jurisdiction to give weight to the evidence presented and determine if medical treatment is necessary. Therefore, this issue is not one over which the Board takes jurisdiction in an appeal of a preliminary order.

2. Is the case barred by K.S.A. (Furse 2000) 44-534(b)?

At the preliminary hearing and in its brief to the Board, respondent has raised the issue that this claimant is barred because claimant failed to file an Application for Hearing with the Division within three years of the date of accident. Claimant was injured on September 15, 2004. Claimant filed an Application for Hearing on October 6, 2008. The last medical treatment claimant received for her work-related injuries, prior to filing the Application for Hearing, was December 4, 2004.

K.S.A. (Furse 2000) 44-534(b) states:

> "The board shall have exclusive jurisdiction to review all decisions, findings, orders and awards of compensation of administrative law judges under the workers compensation act."

The issue of timely filing of the Application for Hearing was not addressed in ALJ Fuller's order. Therefore, the Board does not have jurisdiction to rule on issues not addressed by the ALJ.

CONCLUSION

The Board does not have jurisdiction to consider claimant's appeal or respondent's argument that the claim is out of time.

ORDER

WHEREFORE, it is the finding, decision and order of this Board Member that claimant's appeal be dismissed for lack of jurisdiction.

IT IS SO ORDERED.

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[12] *Allen v. Craig*, 1 Kan. App. 2d 301, 303-304, 564 P.2d 552, *rev. denied* 221 Kan. 757 (1977).

Dated this _____ day of August, 2013.

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HONORABLE SETH G. VALERIUS
BOARD MEMBER

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